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No. 09-1212

IN THE

# Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY
*Petitioner*,

v.

BILLY GROVES, INDIVIDUALLY, D.B.A., SAVANNAH RE-LOAD, SAVANNAH RE-LOAD, AND BRAMPTON ENTERPRISES, LLC.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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May 10, 2010

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*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under rule 37.2 (b).[1]

[1] In accordance with Rule 37.2(a), AAR has provided notice of its intent to file this brief to counsel for petitioner and respondent. Petitioner has consented. The letter expressing consent has been filed with the Clerk of the Court. Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and such requests have been granted in the past.[2]

This case, arising under the demurrage provisions of the Interstate Commerce Commission Termination Act ("ICCTA")[3], 49 U.S.C. §§10743, 10746, presents such an issue. For AAR's member railroads, which play a vital role in the Nation's economy through the transportation of goods in domestic and international commerce, the significance of this case goes well beyond resolution of the immediate dispute over which the parties are litigating. Because of the railroads' compelling need to ensure the efficient movement of railcars over the Nation's 140,000 mile rail transportation network, they have a strong interest in a resolution of the split among the Circuits, created by the Eleventh Circuit's decision below, over whether a party named in a bill of lading as the consignee of a movement of goods can be held presumptively liable under the provisions of the ICCTA for payment of demurrage charges resulting from delay by the named consignee, after acceptance of the delivered goods, in unloading and returning freight cars to the

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[2] *E.g., CSX Transp., Inc. v. Rivenburgh,* 129 S.Ct. 497 (2008); *Norfolk Southern Ry. Co., v. Sorrell,* 548 U.S. 938 (2006) (granting motion of AAR to participate as *amicus curiae*).

[3] The ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, abolished the Interstate Commerce Commission ("ICC") and transferred many of its rail functions to the Surface Transportation Board (STB). The demurrage functions at issue in this proceeding which were formerly performed by the ICC are vested in the STB by virtue of 49 U.S.C. 10743, 10746, and 11122, as reenacted by the ICCTA.

national system, as provided for under the applicable carrier demurrage tariff.

If the consignee named by the shipper in the bill of lading as the party to whom the carrier is instructed to deliver the goods is not to be held presumptively liable under the ICCTA for demurrage charges after accepting the goods, but instead, in some additional manner, must have also "assented" to its status as consignee before it can be held liable for demurrage charges, as the Eleventh Circuit's decision would require, the uniform system of demurrage responsibility and liability under the ICCTA would be fractured and undermined.

When the AAR participates as *amicus curiae* in a case arising under the ICCTA it brings a broad, industry-wide perspective to the issue before the court. Significantly, the issue raised by this case will impact rail car movement and utilization, areas in which AAR has long been involved, primarily through administration and enforcement of industry car service rules that govern the movement of empty freight cars. AAR's expertise in this area is well-recognized. *See Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution Rules, and Practices*, 362 I.C.C. 844, 873-76 (1980), in which the ICC rescinded it's car service rules and "return[ed] the car distribution power to the industry" in reliance on AAR's ability to enforce its own car service rules.

As a trade association representing the nation's major railroads, AAR can offer a broad perspective on the impact of the lower court's ruling by providing the industry's viewpoint, which often may be more expansive than that of the individual litigant, who may not be in a position to fully assess a case's impact on the industry as a whole. In this case, AAR

has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law essential to the efficient movement of freight across the national rail network is not misconstrued to the detriment of the railroad industry.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... iv

STATEMENT OF INTEREST OF *AMICUS CURIAE* ..... 1

SUMMARY OF THE ARGUMENT ..... 2

ARGUMENT ..... 3

I. THE PETITION SHOULD BE GRANTED BECAUSE IT IS ESSENTIAL TO THE EFFICIENT FLOW OF THE NATION'S RAIL COMMERCE THAT THIS COURT RESOLVE THE SPLIT IN THE CIRCUIT COURTS AND CLARIFY THE PRESUMPTIVE STATUTORY LIABILITY OF A CONSIGNEE NAMED IN A BILL OF LADING FOR DEMURRAGE CHARGES ..... 3

A. The Statutory Scheme Reflects the Critical Role of Demurrage Charges in Promoting the Adequate Supply and Efficient Flow of Railcars Over the Nation's Rail Network and Increasing the Capacity of the Rail Network to Meet Current and Future Shipper Needs ..... 3

1. The Nation's rail freight system, including the supply and movement of freight cars, operates as a highly integrated network and the efficiency and capacity of the system relies on the efficient movement and prompt return of freight cars ..... 3

TABLE OF CONTENTS—Continued

Page

2. The ability of rail carriers to impose demurrage charges for the undue detention of railcars is essential to facilitate the efficient flow of commerce over the Nation's rail network and to provide sufficient network capacity to meet the current and future needs of the shipping community ..... 5

3. The critical role of demurrage charges in ensuring efficient rail network flow is of even more importance in today's period of existing and growing rail capacity constraints ..... 6

B. The Decision Below Upsets the National Uniformity and Clarity of the Law Imposing Presumptive Liability for Demurrage Charges on a Consignee Named in a Bill of Lading and Will Create Uncertainty for the Railroad Industry in Applying Demurrage Charges to the Detriment of the Efficient Flow of Commerce Over the Rail Network ..... 8

1. Prior to the Eleventh Circuit's decision below, the general rules governing allocation of liability for demurrage charges were effectively uniform, clear and provided certainty to carriers and the shipping community..... 8

TABLE OF CONTENTS—Continued

Page

2. The Eleventh Circuit decision, in failing to properly apply the requirements of 49 U.S.C. §10743 to the case below, upset the uniformity of the law imposing presumptive liability for demurrage charges on a consignee named in the bill of lading and created a split in the circuits on the issue that must be resolved by this Court ..... 10

3. The Eleventh Circuit decision below not only creates a split in the circuits on the issue of a named consignee's presumptive liability for demurrage charges which this Court must address, but also creates uncertainty and provides conflicting guidance to the railroad industry as to the applicability of demurrage charges to parties named in bills of lading as consignees ..... 12

CONCLUSION ..... 16

## TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| *Alleghany-Ludlum Steel Corp.*, 406 U.S. 742 (1972) | 4 |
| *Car Demurrage Rules, Nationwide*, 350 I.C.C. 777 (1975) | 4 |
| *Chrysler Corp. v. New York C. R. Co.*, 234 I.C.C. 755 (1939) | 5 |
| *CSX Transp. Co. v Novolog Bucks County*, 502 F. 3d 247 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 1240 (2008) | *passim* |
| *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003) | 9 |
| *Louisville & Nashville Ry. Co. v. Central Iron & Coal Co.*, 265 U.S. 59 (1924) | 9 |
| *Middle Atl. Conference v. United States*, 353 F.Supp. 1109 (D.D.C.1972) (three-judge panel) | 9, 13 |
| *Pennsylvania R.R. Co. v. Kittaning Iron & Steel Mfg. Co.*, 253 U.S. 319 (1920) | 5 |
| *Pittsburgh v Fink*, 250 U.S. 577 (1919) | 9 |
| *Norfolk Southern Ry. Co. v. Groves*, 586 F.3d 1273 (11th Cir. 2009) | *passim* |
| *R. Franklin Unger, Trustee of the Ind. Hi-Rail Corp., Debtor-Petition for Declaratory Order-Assessment and Collection of Demurrage of Switching Charges*, STB Docket No. 42030, 2000 STB Lexis 333 | 13 |
| *South Carolina Rys. Com. v. Seaboard Coast L.R.*, 365 I.C.C. 274 (1981) | 6 |
| *S. Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982) | 8 |

TABLE OF AUTHORITIES—Continued

Page

*STB Ex Parte* No. 671, *Rail Capacity and Infrastructure Requirements* (Notice of Public Hearing) (served March 6, 2007) .. 7

*STB Ex Parte* No. 680 (Sub-No. 1) *Supplemental Report on Capacity And Infrastructure Investment* (served April 8, 2009) ..... 7

*Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 271 U.S. 259 (1926) ..... 5

*Union Pacific Railroad Co. v. Ametek, Inc.*, 104 F.3d 558 (3d Cir.1997). ..... 5

STATUTES

Federal Bills of Lading Act (49 U.S.C. §80101 (1)) ..... 8

ICC Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (1995) ..... *passim*

49 U.S.C. §10743 ..... *passim*

49 U.S.C. §10746 ..... 6

49 U.S.C. §10702. ..... 6

MISCELLANEOUS AUTHORITIES

Association of American Railroads, *Railroad Facts* (2009 ed.) ..... 4

*Black's Law Dictionary* (8th ed. 2004)..... 8

*Freight Railroads, Industry Health Has Improved, But Concerns About Competition and Capacity Should Be Addressed* (October 2006) (GAO-07-94). ..... 7

*National Rail Freight Infrastructure Capacity and Investment Study (Cambridge Systematics)* (September 2007)..... 7

TABLE OF AUTHORITIES—Continued

Page

*Supplemental Report to the U.S. Surface Transportation Board on Capacity and Infrastructure Investment (Christensen Associates, Inc.)* (released April 8, 2009) (*available on STB website at* http://www.stb.dot.gov.) ..... 7

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The interest of a*micus curiae* Association of American Railroads (AAR) is set forth in the attached Motion of the Association of American Railroads for Leave to File a Brief *Amicus Curiae*.[1]

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

## STATEMENT OF THE CASE

*Amicus* adopts the Statement of the Case of petitioner.

## SUMMARY OF THE ARGUMENT

Because the rail freight system operates as a network, the basic operation of the demurrage scheme under the ICCTA for determining liability for undue detention of railcars must provide uniformity and certainty to carriers, car suppliers and the shipping community throughout the network if it is to operate effectively. The ICCTA, as well as the relevant case law before the Eleventh Circuit decision below, provided such uniformity and certainty by effectively establishing clear rules governing allocation of demurrage liability and by giving effect to the statutory language of 49 U.S.C. §10743. Section 10743 specifically governs the allocation of demurrage liability where, as in the case below, a consignee named in the bill of lading contends that it is not responsible for demurrage charges even though it accepted the goods (and was responsible for the demurrage).

Unlike the Third Circuit decision in *CSX Transp. Co. v Novolog Bucks County*, 502 F. 3d 247 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 1240 (2008) ("*Novolog*") the Eleventh Circuit decision below ignored the clear statutory terms of 49 U.S.C. §10743 and imposed an extra-statutory "assent" requirement upon the meaning of the term "consignee" that will create both lack of uniformity and uncertainty as to the applicability of demurrage charges to named consignees in carrier bills of lading to the detriment of the efficient movement of freight cars throughout the national rail network. The Eleventh Circuit's decision thus seriously undermines the effectiveness of demurrage

charges in promoting the efficiency of the Nation's rail network and warrants review by this Court to restore the uniformity and clarity of the law.

## ARGUMENT

### THE PETITION SHOULD BE GRANTED BECAUSE IT IS ESSENTIAL TO THE EFFICIENT FLOW OF THE NATION'S COMMERCE THAT THIS COURT RESOLVE THE SPLIT IN THE CIRCUIT COURTS CREATED BY THE DECISION BELOW AND CLARIFY THE PRESUMPTIVE STATUTORY LIABILITY OF A CONSIGNEE NAMED IN A BILL OF LADING FOR DEMURRAGE CHARGES

#### A. The Statutory Scheme Reflects the Critical Role of Demurrage Charges in Promoting the Adequate Supply and Efficient Flow of Railcars Over the Nation's Rail Network and Increasing the Capacity of the Rail Network to Meet Current and Future Shipper Needs

##### 1. The Nation's rail freight system, including the supply and movement of freight cars, operates as a highly integrated network and the efficiency and capacity of the system relies on the efficient movement and prompt return of freight cars.

The U.S. freight rail system extends over approximately 140,000 miles of track owned and operated by privately-owned freight rail carriers (including petitioner Norfolk Southern Railway Company ("NS")). Although there are approximately 567 U.S. rail

freight carriers with various ownership or leased rights in individual lines of railroad track,[2] the U.S. rail freight system is highly integrated and operates as a network. Rail carriers must routinely interchange freight at established junction points to deliver goods in interline service to destinations that are not located on their lines. (Rail carriers also routinely provide "single-line" service over their own lines or other carriers' lines under negotiated lease or track use arrangements.)

The effective capacity and efficiency of the national rail system depends not only on the size of the network, but also on the availability and efficient movement of freight cars over that network. Because it is not economically feasible or practical for rail carriers to own all the railcars that would be necessary to adequately serve the shipping community at peak or high demand periods, the network's railcar fleet consists of railcars owned by freight carriers, private car leasing companies and the shipping community.[3] These cars are routinely interchanged over the rail network and their prompt availability to carriers and shippers when needed must be assured.[4] Adequacy of supply and efficiency of use of railcars

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[2] ASSOCIATION OF AMERICAN RAILROADS *Railroad Facts* 3 (2009 ed.).

[3] As of 2008, there were approximately 1.4 million freight cars in service. *Railroad Facts* at 51.

[4] Car shortages are normal occurrences in times of peak or unexpected demand (or national emergencies) and vary in duration and severity. Demurrage rules requiring prompt return of railcars is essential to meet carrier and shipper needs and prevent system-wide backups on the rail network. See *Car Demurrage Rules, Nationwide*, 350 I.C.C. 777, 787 (1975); *Alleghany-Ludlum Steel Corp.*, 406 U.S. 742, 745 (1972).

over the rail freight network is essential to ensure that the Nation's rail freight network operates efficiently and provides sufficient capacity to meet the current and future needs of the shipping community.

**2. The ability of rail carriers to impose demurrage charges for the undue detention of railcars is essential to facilitate the efficient flow of commerce over the Nation's rail network and to provide sufficient network capacity to meet the current and future needs of the shipping community.**

As Congress recognized from the early days of railroad regulation (and as was recognized at common law), the ability of a carrier to impose demurrage charges on a shipper or consignee for undue delay in loading or unloading freight cars is essential for the efficient movement of freight over the rail network. *Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 271 U.S. 259, 262 (1926); *Pennsylvania R.R. Co. v. Kittaning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323 (1920). Demurrage is a charge that both compensates rail carriers for the expenses incurred when rail cars are unduly detained by shippers or consignees for loading and unloading freight and serves as a penalty for undue car detention (to encourage the speedy return of rail cars to the rail network). See *Chrysler Corp. v. New York C. R. Co.*, 234 I.C.C. 755, 759 (1939); *Union Pacific Railroad Co. v. Ametek, Inc.*, 104 F.3d 558, 559 n. 2 (3d Cir.1997).

Because of its importance in facilitating an adequate car supply and promoting the efficient movement of railcars through the Nation's rail network,

demurrage has long been subject to regulation by the Surface Transportation Board ("STB") (and its predecessor agency, the Interstate Commerce Commission ("ICC")). See *Turner, Dennis & Lowry Lumber Co., supra*; *Pennsylvania R.R. Co. v. Kittaning Iron & Steel Mfg. Co., supra*. Under the ICCTA, carriers impose demurrage charges on shippers or consignees for undue delay in loading or unloading railcars to ensure that cars are not unduly detained or improperly used as storage facilities. As required by 49 U.S.C. §10746, carriers "shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to-(1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property."[5]

### 3. The critical role of demurrage charges in ensuring efficient rail network flow is of increasing importance in today's period of existing and growing rail capacity constraints.

The existing national rail system is currently at or near capacity on several line segments and the rail industry must spend billions of dollars over the coming decades to expand network capacity to meet

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[5] Demurrage charges and terms are imposed pursuant to carrier tariff and are subject to the requirement, if challenged, that they be "reasonable" as determined by the STB. 49 U.S.C. §10702. Under the controlling NS tariff in this case, a consignee is allowed two days to unload freight without incurring demurrage charges. Pet. App. A at 23a-24a. Demurrage charges are generally assessed and retained by the railroad on whose line the cars are detained. See *South Carolina Rys. Com. v. Seaboard Coast L.R.*, 365 I.C.C. 274, 277 (1981).

the growing needs of domestic and international rail commerce.[6] Because an essential element in meeting the growing capacity needs of the rail shipping community is the more efficient use of railcars on the network, it is vital to the industry that its ability to impose and enforce demurrage charges for the undue detention of railcars throughout the national system not be impaired. A transportation disruption resulting from undue detention of railcars anywhere on the national system is not merely localized but has the potential to cause serious delays throughout the system.

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[6] See, e.g., *National Rail Freight Infrastructure Capacity and Investment Study (Cambridge Systematics)* (September 2007) (results of study indicating that approximately $148 billion must be invested over the next 30 years to increase rail freight capacity); see also *Supplemental Report to the U.S. Surface Transportation Board on Capacity and Infrastructure Investment (Christensen Associates, Inc.)* (released April 8, 2009) (available on STB website at http:www.stb.dot.gov.); *Freight Railroads, Industry Health Has Improved, But Concerns About Competition and Capacity Should Be Addressed* (October 2006) (GAO -07-94). The Surface Transportation Board has also instituted various proceedings and commissioned studies to examine the capacity needs of the railroad industry. *See, e.g.*, STB Ex Parte No. 671, *Rail Capacity and Infrastructure Requirements* (Notice of Public Hearing) (served March 6, 2007); STB Ex Parte No. 680 (Sub-No. 1) *Supplemental Report on Capacity and Infrastructure Investment* (served April 8, 2009).

### B. The Decision Below Upsets the National Uniformity and Clarity of the Law Imposing Presumptive Liability for Demurrage Charges on a Consignee Named in a Bill of Lading and Will Create Uncertainty for the Railroad Industry in Applying Demurrage Charges to the Detriment of the Efficient Flow of Commerce Over the Rail Network

#### 1. Prior to the Eleventh Circuit's decision below, the general rules governing allocation of liability for demurrage charges were effectively uniform, clear and provided certainty to carriers and the shipping community.

The bill of lading is "the basic transportation contract between the shipper-consignor and the carrier" and its terms and conditions "bind the shipper and all connecting carriers." *S. Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342 (1982); *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 263 (3d Cir. 2007). The bill of lading, *inter alia*, instructs the carrier where to transport the goods and provides the carrier with the names of the shipper and the consignee. The consignee, in normal meaning and normal use throughout the rail industry (and as used by other transportation modes), is "[o]ne to whom goods are consigned." *Black's Law Dictionary* 327 (8th ed. 2004).[7] The carrier has a legal

[7] The Eleventh Circuit decision below specifically noted that the above was the normal meaning of the term "consignee" and that both the Federal Bills of Lading Act (49 U.S.C. §80101 (1)) ("'consignee' means the person named in a bill of lading as the

obligation to transport the shipment to the consignee named in the bill of lading. *Novolog*, 502 F.3d at 259.

Until the Eleventh Circuit's decision below, the law was clear that a consignee named in the bill of lading becomes a party to the transportation contract, and is bound by it, when it accepts the freight.[8] The law was also clear that a consignee named in a bill of lading who is responsible for undue delay in unloading goods and returning rail cars to the national rail system is liable for demurrage charges set forth in a carrier's demurrage tariff.[9]

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person to whom the goods are to be delivered'") and NS's demurrage tariff defined consignee in a consistent manner. See Pet. App. A at 5a, n.3.

[8] *Novolog*, 502 F.3d at 254-255 (citing, *inter alia*, *Louisville & Nashville Ry. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 70 (1924) ("if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later"); *see also Pittsburgh v Fink*, 250 U.S. 577, 581 (1919) ("The weight of authority seems to be that the consignee is prima facie liable for the payment of the freight charges when he accepts the goods from the carrier.").

[9] *Middle Atl. Conference v. United States*, 353 F.Supp. 1109, 1118 (D.D.C.1972) (three-judge panel); *Novolog*, 502 F.3d at 254-255 (3d Cir. 2007). The AAR recognizes that there exists language in *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003) (and a small number of district court decisions) that the Eleventh Circuit cited in support of its decision. See Pet. App. A at 14a, 19a-20a. Until the Eleventh Circuit's decision, however, there was no actual split in the circuits on the issue decided below and no serious challenge to the demurrage system as long interpreted by the courts and the STB/ICC. See Brief of Petitioner at 24, n. 19. The Eleventh Circuit itself noted that its "research has disclosed very few opinions by federal circuit courts dealing with the narrow issue presented in this case." Pet. App. A at 9a, n. 4.

**2. The Eleventh Circuit decision, in failing to properly apply the requirements of 49 U.S.C. §10743 to the case below, upset the uniformity of the law imposing presumptive liability for demurrage charges on a consignee named in the bill of lading and created a split in the circuits on the issue that must be resolved by this Court.**

The Eleventh Circuit, in purporting to properly construe the term "consignee" as applied to the facts alleged by respondent in the case below, basically redefined the term by adding a new requirement of "assent." In so doing, the Eleventh Circuit not only effectively ignored the specific statutory provision that precisely addresses the issue (49 U.S.C. §10743) but also created a split in the circuits as well as great uncertainty in the law governing demurrage charges that must be resolved by this Court.

In both *Novolog* and the instant case, a rail carrier sought to impose demurrage charges on a transloader/warehouseman (reloader) of freight named as consignee on the bill of lading resulting from the named consignee's undue detention of railcars for unloading. In both cases, the named consignee claimed it was not liable for the demurrage charges, even though it accepted the goods delivered by the carrier, because it was not a party to the bill of lading and had not authorized the shipper to name it as consignee. *Novolog*, 502 F.3d at 257; Pet. App. A at 7a. In deciding the respective cases, the Third Circuit and the Eleventh Circuit reached diametrically opposing results.

The *Novolog* court held that the case was specifically governed by the "consignee-agent liability provisions" of the ICCTA (49 U.S.C. §10743), which "appears designed to address precisely the . . . situation where a carrier assesses charges after delivery against the named consignee and recipient of the freight, but the consignee/recipient contests its liability for the charges on the grounds that it is a mere middleman." *Id.* at 256.[10]

The *Novolog* court found that the specific requirements of the consignee-agent liability provisions of the ICCTA controlled and that the "requirements were not burdensome: the consignee agent is obligated merely to notify the carrier, in writing, of the agency relationship" in advance of accepting the goods. *Id.* at 255-56. The *Novolog* court also found that "to hold that the documented designation of an

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[10] Section 49 U.S.C. §10743 (a) (1) provides as follows:

> "Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. *When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property—*
>
> *(A) of the agency and absence of beneficial title; and*
>
> *(B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading." (emphasis added).*

entity as a consignee and that entity's acceptance of the freight is insufficient to hold it presumptively liable for demurrage charges would frustrate the plain intent of the statute, which is to establish clear, easily enforceable rules for liability." *Id.* at 257.

In contrast to *Novolog*, the Eleventh Circuit in its decision below found that the consignee-agent provisions of 49 U.S.C. §10743 were simply not applicable. As grounds for so finding, the Eleventh Circuit effectively rejected the normal definition of "consignee" ("the party designated to receive a shipment of goods") as long-used in the case law and found that the warehouseman/reloader named as consignee in the bill of lading was not in fact a consignee because it had not consented to be named as consignee in the bill of lading. Pet. App A at 18a-19a. As held by the court below: "[A] party must assent to being named as a consignee on the bill of lading to be held liable as such, or at the least, be given notice that it is being named as a consignee in order that it might object or act accordingly." Pet. App. A at 19a.

**3. The Eleventh Circuit decision below not only creates a split in the circuits on the issue of a named consignee's presumptive liability for demurrage charges which this Court must address, but also creates uncertainty and provides conflicting guidance to the railroad industry as to the applicability of demurrage charges to parties named in bills of lading as consignees.**

The Eleventh Circuit, in reaching its decision, effectively turned the rules of demurrage on its head and created the potential for confusion in the applica-

tion of demurrage charges not only in the Eleventh Circuit but throughout the national rail system. Under the long-established case law and the provisions of 49 U.S.C. §10743, it is the *carrier* that must be notified by the *consignee* named on the bill of lading ("the party to whom the goods are consigned") of the consignee's alleged agency relationship (with disclosure of the named principal) prior to the consignee's acceptance of the goods, in order for the alleged consignee-agent to avoid demurrage charges imposed under the carrier's tariff.[11] The carrier is in no position, and under no common law or ICCTA obligation, to question or ascertain whether the named consignee in a bill of lading actually "consented" to be named as consignee before delivering the goods, and can only rely on the named consignee's acceptance of the goods without objection as proof of its consignee status. Unless notified otherwise, the carrier is entitled to presume that the named consignee is in fact the consignee and will pay any demurrage charges that accrue.

Indeed, this is the only rule that can work effectively in practice without creating serious confusion. The carrier itself plays no legal role in determining

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[11] *See, Middle Atl. Conference*, 353 F.Supp. at 1120-21 ("The law is well settled that an agent for a disclosed principal is not liable to a third person for acts within the scope of agency."); *R. Franklin Unger, Trustee of the Ind. Hi-Rail Corp., Debtor-Petition for Declaratory Order-Assessment and Collection of Demurrage of Switching Charges*, STB Docket No. 42030, 2000 STB Lexis 333, n. 13 ("demurrage and detention charges . . . do not apply to agents acting for the principal parties to the transportation [if] the agency relationship [is] disclosed"). The Eleventh Circuit's decision expressly recognizes that this common law rule of agency is reflected in the provisions of 49 USC §10743 (a)(1). Pet. App. A at 12a-13a.

the agency status of the named consignee and it cannot be held responsible for second-guessing the designation on the bill of lading. As instructed by the bill of lading and as required under the terms of the carrier's demurrage tariff, the carrier has a legal obligation under the ICCTA both to deliver the goods to the named consignee and to impose demurrage charges on the named consignee pursuant to the tariff's terms.[12] Nonetheless, under the Eleventh Circuit's ruling, carriers may come to find, after the goods have been delivered and accepted, that the named consignee has no intention of paying the demurrage charges. Carriers should not be left in a state of uncertainty as to their ability to impose demurrage charges under circumstances over which they have no control.

Moreover, as found by the *Novolog* court, the burden imposed on an alleged agent-consignee by the advance written notice requirement of 49 U.S.C. §10743 is minimal. Only the alleged agent-consignee named as consignee in a bill of lading is aware of its putative agent-consignee status prior to its acceptance of the goods delivered by the carrier. *In virtually all cases, moreover, the alleged agent-consignee has specific advance notice from the carrier, prior to the delivery of the goods, as to the origin and nature of the goods, when the goods are ready for delivery to the alleged agent-carrier's facility and that the recipient of the notice is the party designated by the shipper to receive the goods.* Prior to its acceptance of

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[12] The Eleventh Circuit's decision expressly recognizes these carrier obligations ("Norfolk is required by the ICCTA and the terms of its own tariff to assess demurrage charges against the shipment's consignee for any delay in unloading the rail cars at their destination."). Pet. App A at 6a.

the goods, the alleged agent-consignee thus has ample time to inform the carrier of its agent status as to specific shipments (and disclose the name of its principal) so that the carrier is in a position to ascertain (and confirm if necessary) the party liable for demurrage charges. Indeed, the Eleventh Circuit's decision itself specifically notes that "[b]efore rail cars were delivered, Norfolk would notify Savannah [respondent] that rail cars from certain shippers had arrived and were ready for delivery." Pet. App. A at 3a – 4a. The named consignee thus had ample time in this proceeding to simply notify the carrier as to its alleged agent-consignee status with respect to such shipments and simply declined to do so.[13]

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[13] Under standard industry practice, moreover, specific delivery arrangements are normally made by carriers and consignees (including agent/consignees) far in advance of actual delivery, and communication between the parties regarding the status of a specific shipment is ongoing prior to delivery. For example, a specific recipient (the party to whom the rail cars will be physically delivered) may issue general pre-delivery instructions to a carrier to deliver cars from a specific shipper after arrival in the carrier's destination terminal on the first available train to the recipient's facilities to the extent there are sufficient spots for the cars (e.g., "spot on arrival" instructions). Under such instructions, if the number of cars arriving at the carrier's destination terminal exceed the amount of spots then available at the recipient's facilities (a fact known by the carrier's local agent), the carrier would keep the remaining cars at its destination yard in "constructive placement" to be delivered when spots are available. Another recipient may generally instruct the carrier to store arriving cars in constructive placement in the carrier's destination rail yard awaiting further delivery instructions from the recipient (e.g. "order in" instructions). It is thus a simple matter for a receiving facility—including a transloader or warehouseman/reloader—to notify the carrier in advance of delivery of a shipment as to its "consignee" or "agent" status as to a particular carload of freight.

In contrast, the Eleventh Circuit's decision below not only places serious burdens on the ability of rail carriers to apply demurrage charges on a uniform basis throughout the national rail system, it provides no incentive for named consignees such as trans-loaders/warehousemen (or indeed any other consignees who can claim that they never "consented" to be named as consignees in the bill of lading) to comply with their obligation to promptly unload and return rail cars to the national system. The Eleventh Circuit's decision seriously undermines the effectiveness of demurrage charges in promoting the efficiency of the Nation's rail network and warrants review by this Court to restore the uniformity and clarity of the law.

## CONCLUSION

For the foregoing reason, the petition for certiorari should be granted.

Respectfully submitted,

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